United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 8, 2005

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Arlen Beach Condominium Association, Inc. 530-4090-4000
Case 12-CA-24507 530-5400
530-6033-4270
530-8033
712-5042-5000
712-5042-6700
725-6783-1400
725-6783-7000

This case was submitted for advice as to whether the Employer unlawfully refused to deal with a labor organization the Union had designated as its agent for collective-bargaining and representational purposes.

In entering into the service agreement with the other labor organization, the Union impermissibly delegated its Section 9(a)representational responsibility as well as its representational duties and functions. Since this was not a valid delegation of authority, the Employer did not violate the act by refusing to meet and bargain with the Union's designated agent.

FACTS

The Employer operates a high-rise condominium building in Miami Beach, Florida. Since at least 1984, Charging Party Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Local 355 (Local 355) has represented a unit of about 20 porters, maintenance and other condominium workers under a series of collective-bargaining agreements. The parties' most recent agreement was effective from January 1, 1999 to December 31, 2002. Since then, the labor agreement was extended from year to year pursuant to an automatic renewal clause.

Prior to the events at issue here, Local 355's relationship with the unit employees was relatively informal. Virtually all contract negotiation, contract administration and grievance matters were handled by longtime Local 355 President Jorge Santiesteban.[1] Although

[1] Contract negotiations were handled by Santiesteban or another Local 355 officer, and rarely took more than one

Local 355 normally held formal quarterly meetings with other bargaining units, it would meet with the Arlen Beach unit as a group only if there was a specific problem at the building. Otherwise, Santiesteban handled all unit employee problems on an individual basis.

During 2004,[2] Service Employees International Union established a new local union, SEIU Local 11 (Local 11), to specialize in the representation of condominium workers in Miami. In April or May, Local 11 contacted Local 355 to offer its assistance and expertise in representing its two condominium bargaining units.[3]

Thereafter, on June 4, the two unions signed a Local 11-drafted service agreement providing that Local 11 would serve as Local 355's agent "with respect to its collective bargaining responsibilities concerning [the Arlen Beach bargaining unit]." The service agreement, which was to be effective on July 1, states that Local 355 designated Local 11 as its agent in order to give the Arlen Beach employees "the best collective bargaining representation available" and notes that Local 11 "has the staff, resources and commitment to effectively represent [them]."

Under the service agreement, Local 11, as Local 355's agent, is responsible

> for the performance of all collective bargaining representation duties on behalf of the bargaining [unit and] shall perform such duties as collective bargaining negotiations, administration of the contract, adjustment of grievances and the representation of bargaining unit members.

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bargaining session. When employees participated in negotiations, they did so through a committee of two or three employees.

[2] All dates are in 2004 unless otherwise indicated.

[3] At the time, Local 11 had no members of its own.

The agreement also provides that Local 355 and Local 11 are to "fully cooperate with each other to insure that [Local 11] has all materials and information necessary" to perform as Local 355's agent and that Local 355 "shall take all steps reasonably necessary to assist" Local 11, including by providing employee contact information and introducing Local 11 staff and officers to the bargaining unit members. Local 355 is also to "reimburse [Local 11] for all costs associated with [its agency] in an amount not to exceed the dues received from the [bargaining unit members]."

The service agreement also requires Local 11 to "regularly" report to Local 355 "with respect to collective bargaining and other duties" performed on its behalf, and Local 355 retains "ultimate control of the representation of the employees" as well as its status as the employees' 9(a) representative. In addition, the service agreement provides that

> Any disputes between the parties arising under this agreement shall be resolved through good faith discussions after full disclosure of the facts supporting the parties' respective claims. If any such matter remains unresolved, either party may request assistance of the SEIU Executive Vice President for the Southern Region, whose decision in the matter shall be final.

Finally, by its terms the service agreement will be in effect "unless and until it is amended or terminated by mutual consent of the parties."

In addition to the "ultimate control" reserved under the service agreement, Local 355 asserts that it retains control over all pension fund matters, such as premium increases and collection matters,[4] and over whether to go forward with arbitration of grievances.[5] Local 355 concedes

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[4] The Region has concluded that matters involving increases in premiums, employer failures to meet their contractual benefits obligations and other collections matters are, in fact, handled by the fund administrators, not by Local 355 or its officers.

[5] Only one grievance has arisen since the service agreement was signed. As discussed below, Local 355's involvement was limited to instructing Local 11 to proceed at the time the grievance arose. While the details provided by Local 355 are sketchy at best, there is no indication that Local 355 was involved in Local 11's ultimate decision to take the grievance to arbitration.

that the service agreement is silent regarding such reservations of authority and that there is no other documentation to support its claims.

On December 24, 2004, the Employer gave written notice of its desire to cancel the parties' collective-bargaining agreement. On December 30, Local 11 President Rob Schuler responded, stating that "the Union" was willing to negotiate a new agreement and that SEIU Local 11 would lead the negotiations pursuant to its servicing agreement with Local 355. On January 5, 2005, the Employer asked for a copy of the service agreement in order to assess the Employer's obligation to bargain with Local 11. On January 7, Local 355 responded that the Employer did not have the right to examine the service agreement because it was a matter of internal Union governance. Local 355 assured the Employer that Local 355 had designated Local 11 as its agent for fulfilling Local 355's responsibilities as the employees' authorized bargaining representative.

Over the next few months, Local 355 insisted that the Employer was obligated to negotiate with its duly designated agent, Local 11, and was violating the Act by refusing to do so, while the Employer refused to consider meeting with Local 11 without first having the opportunity to review the servicing agreement with Local 355. The Employer stated that it did not want to commit an unfair labor practice by negotiating with an improper bargaining representative, but made clear that it was ready and willing to negotiate with Local 355. The Employer ultimately received a copy of the service agreement in late March. On April 28, the Employer wrote to the attorney representing both Local 355 and Local 11 that the Employer would not negotiate with Local 11, but remained ready to begin negotiations with Local 355.

It appears that Local 355 told the unit employees about the service agreement before it was signed, but has not had any meetings with unit employees since the service agreement was signed. Local 11 has assigned a representative to the Arlen Beach unit who is handling all employee grievances and day-to-day matters.[6] As noted above, Local 355 claims that one grievance, involving a discharge, has arisen since the service agreement went into effect. The employees' assigned Local 11 representative contacted Local 355 regarding the

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[6] Local 355 is unsure whether the Employer has allowed the Local 11 representative access to the building and is unsure how or if Local 11 is directly communicating with the employees. Santiesteban has been acting as an intermediary, relaying messages from Local 11 to the employees and employee problems or concerns to Local 11.

initial decision to proceed but thereafter Local 355 has not had any other involvement in the processing of the grievance; Local 11 has handled the grievance through the contractual steps and, in April or May 2005, requested arbitration.

Local 355 asserts that it has validly designated Local 11 as its agent under the service agreement and that the Employer's refusal to negotiate with its agent violates the Act. The Employer's position is that by failing to retain ultimate responsibility for representing the unit employees, Local 355 and has done more than simply authorize Local 11 to act as its bargaining agent. Instead, it argues, the service agreement amounts to a transfer of representation from Local 355 to Local 11 without first establishing that the employees want Local 11 to succeed to Local 355's bargaining rights and status to represent them.

ACTION

We conclude that Local 355's attempt to designate Local 11 as its agent was invalid because the service agreement embodied too broad a delegation of Local 355's Section 9(a)representational authority and responsibility to Local 11. Therefore, the instant charge should be dismissed, absent withdrawal.

It is well settled that unions may designate agents to represent employees on their behalf,[7] including for the purpose of conducting contract negotiations.[8] It is equally clear that one labor organization may act as the agent of another.[9]

However, while a certified representative may delegate its duties to an agent under a contract, it cannot delegate

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[7] See, e.g., Rath Packing Co., 275 NLRB 255, 256 (1985) (citing Spriggs Distributing Co., 219 NLRB 1046, 1049 (1975) and Independent Stave Co., 148 NLRB 431, 436 (1964), enfd. 352 F.2d 553 (8th Cir. 1965), cert. denied 384 U.S. 962 (1966)); Kansas AFL-CIO, 341 NLRB No. 131, slip op. at 1 (2004); Ball Corp., 322 NLRB 948, 948 (1997).

[8] Goad Company, 333 NLRB 677, 679 (2001) (citing General Electric Co. v. NLRB, 412 F.2d 512, 516 (2d Cir. 1969)).

[9] See, e.g., Mine Workers Local 17 (Joshua Industries), 315 NLRB 1052, 1064 (1994), enfd. 85 F.3d 616 (4th Cir. 1996) (Table); Kodiak Island Hospital, 244 NLRB 929, 929-930 (1979).

its Section 9(a) responsibility.[10] Thus, the Board has held that while an international union or subsidiary district can delegate a function such as contract negotiation or grievance handling to a lower affiliate or local union, the statutory duty of fair representation cannot itself be delegated.[11] There are two underlying reasons for this: from the standpoint of represented employees, only they have the statutory power to confer 9(a) status upon a chosen representative; from an employer's perspective, the Act does not impose an obligation to recognize and bargain with any representative other than the certified or recognized 9(a) representative of its employees.

The Board has twice considered servicing agreements between unions like the one at issue here and found them invalid.[12] In Sherwood Ford,[13] an independent union entered into an agreement with a Teamsters local to service a unit of the employer's salesmen in contract negotiations and all other matters relating to the employees' terms and conditions of employment.[14] The Board affirmed the decision of the trial examiner that the employer lawfully refused to bargain with the independent union's designated agent because the two unions were attempting an outright substitution of representatives, not merely a delegation of duties from principal to agent.[15] In reaching this conclusion, the trial examiner relied on two provisions of

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[10] Mine Workers Local 17, 315 NLRB at 1063-1064, quoting United Mine Workers (Garland Coal), 258 NLRB 56, 59 (1981), enfd. 727 F.2d 954 (10th Cir. 1984). See also Reading Anthracite Co., 326 NLRB 1370, 1371 (1998) (citations omitted).

[11] See Mine Workers Local 17, 315 NLRB at 1063-1064; United Mine Workers, 258 NLRB at 59.

[12] Sherwood Ford, 188 NLRB 131 (1971); The Goad Co., 333 NLRB 677 (2001).

[13] 188 NLRB 131 (1971).

[14] Id. at 132, 139-140.

[15] Id. at 134 ("[t]hough the preample [sic] paragraphs sought to lay a foundation for associating the services of an expert to aid [the independent union] in bargaining . . . its other provisions themselves tended to confirm the conclusion that an actual substitution was intended of Local 604 as the bargaining representative of the salesmen . . . ").

the service agreement. The first of these was a provision that, contrary to elementary principles of agency law, directed the purported principal, the independent union, "to follow and carry out all instructions received from . . . Local 604," its supposed agent.[16] A second provision that Local 604 would receive as compensation for its services dues according to its own schedule, which were twice the amount the employees paid to the independent union, also supported the conclusion that the parties sought to substitute representatives.[17] The fact that the parties had failed in two earlier attempts to replace the independent union with Local 604 also drove home that the service agreement was not a mere attempt to secure the benefits of Local 604's expertise as the independent union's agent.[18]

The second case, The Goad Co., involved an agreement between Philadelphia-based Pipefitters Local 420 and St. Louis-based Pipefitters Local 562 to service a Missouri bargaining unit represented by Local 420.[19] The Board affirmed the judge's conclusion that the employer lawfully refused to bargain with Local 562 because Local 420 "did not simply enlist the aid of an agent, but transferred its representational responsibilities to Local 562."[20] The judge found that the service agreement when read in its entirety was not a simple agency agreement.[21] Most telling was the inclusion of an indemnification clause which provided that Local 562 would hold Local 420 harmless for any asserted breach of the duty of fair representation arising out of Local 562's service as Local 420's agent.[22] In the judge's view, this attempt to insulate Local 420 from

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[16] Ibid.

[17] Ibid.

[18] Id. at 132-134 (service agreement was entered into after a Local 604 petition to represent the salesmen was dismissed as contract-barred and the independent union's attempt to affiliate with Local 604 had failed because of procedural defects; the agreement was "a device, subterfuge, or stratagem by which the two locals sought to circumvent earlier rulings of the Regional Director").

[19] 333 NLRB at 677-678.

[20] Id. at 677 n. 1.

[21] Id. at 679.

[22] Ibid.

its statutory responsibility stood "the law of agency on its head."[23] The judge also found the broad scope of the functions and duties delegated to Local 562, i.e., representing Local 420 at the bargaining table, responsibility for administering the new contract once reached, grievance handling and "other actions comprising the duty of representation," demonstrated that under the service agreement, Local 420 would be the employees' representative in name only.[24] The fact that all of these delegated functions would be carried out by a Local 562 appointee also bolstered the conclusion that Local 562 was to be more than a mere agent of Local 420,[25] as did the fact that all dues and fees from the unit would be paid over to Local 562 in exchange for its services.[26] Finally, the judge noted that the case was factually parallel to Sherwood Ford in that both service agreements arose after failed attempts to substitute the putative agent-union as the employees' 9(a) representative.

Advice also considered a servicing agreement between HERE Local 10 and SEIU District 1199 in Suburban Pavilion, Inc.,[27] and found it to be a valid delegation of duties rather than a transfer of representational responsibilities. In contrast to Sherwood Ford and Goad, in Suburban Pavilion, the principal, Local 10, clearly retained responsibility for the bargaining unit even though it delegated certain representational duties to its designated agent, District 1199. The delegated duties included providing unit employees with representation at grievance proceedings and arbitration hearings; representing Local 10 at labor-management meetings and assisting Local 10 in appearances before the Board on behalf of the unit employees. Significantly, Local 10 did not delegate responsibility for contract negotiations to District 1199. Nor did the service agreement include any provisions inconsistent with the existence of an agency relationship comparable to the indemnification provision in Goad or the contractual requirement that the principal union follow the instructions of its purported agent in Sherwood Ford. Rather, under the

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[23] Ibid.

[24] 333 NLRB at 678, 679.

[25] Id. at 679.

[26] Id. at 680.

[27] Case 8-CA-33560, Advice Memorandum dated February 20, 2003.

Suburban Pavilion service agreement, Local 10 not only had ultimate responsibility as the 9(a) representative, it also retained responsibility for contract negotiations, and the agreement further required District 1199 regularly to meet with Local 10 to report on the status of representation matters. The agreement also expressly reserved to Local 10 the right to attend and assist with unit meetings, specified that it would have access to records concerning the unit and that Local 10 officers and stewards would continue to serve in those capacities.

In authorizing complaint in Suburban Pavilion, we also relied upon evidence that Local 10 exerted actual control and oversight over its agent and the day-to-day administration of the collective bargaining agreement. In this latter regard, there was evidence that Local 10 reprimanded a District 1199 representative for an unannounced visit to the employer's facility during contract negotiations between Local 10 and the employer. Local 10 also required District 1199 to give it advance notice of unit meetings and site visits, to clear any correspondence with Local 10 and to provide regular briefings on grievance matters. We concluded that although Local 10 delegated certain of its duties to District 1199, both the terms of the agreement and Local 10's conduct demonstrated that it had plainly retained responsibility and control over the bargaining unit and at all times remained the principal in its relationship with District 1199. We therefore concluded that the employer violated Section 8(a)(5) by refusing to deal with District 1199 as the designated agent of Local 10.

These precedents teach that while unions can delegate to other unions some of their representational functions and duties, they cannot agree to cede their ultimate responsibility under Section 9(a) to represent the employees. In other words, they must retain the essential elements of representation, i.e., those that flow from the employees' statutory right to select an exclusive collective-bargaining representative, or the desired agency relationship will be deemed an invalid attempt to substitute one bargaining representative for another. That Local 355 has attempted to do so here is evident from both the terms of the service agreement itself and the evidence regarding its dealings with the employees and Local 11 since the service agreement went into effect.

The service agreement fails on its face to reserve to Local 355 any collective-bargaining or representational functions or duties. The sweeping delegation to Local 11 of virtually all matters pertaining to the unit employees at and away from the bargaining table is comparable to the broad delegations in Sherwood Ford and Goad, and different from the retention of contract negotiation and other representational duties by the union-principal under the service agreement in Suburban Pavilion. More significantly, the service agreement, by its terms, precludes Local 355 from effectively representing the employees. Thus, notwithstanding the contractual reservation of Local 355's "ultimate control of the representation of the employees," the agreement makes Local 11's SEIU regional vice president the final arbiter of any dispute under the agreement, and thus Local 355 would not be able to prevail in a dispute with Local 11 over how best to represent the employees. Nor can Local 355 even cancel the agreement without Local 11's consent. Like the contractual requirement in Sherwood Ford that the principal-union report to and follow the instructions of its agent and the indemnification provision in Goad purporting to insulate the principal from its statutory liability for the acts of its agent, the service agreement's dispute resolution and termination provisions belie the existence of a bona fide agency relationship between Local 355 and Local 11. The contractual inability to control its ostensible agent or terminate the agency relationship makes clear that Local 355 has impermissibly tried to delegate its 9(a) responsibility.

Other aspects of Local 355's relations with Local 11 and the employees since the service agreement went into effect also support the conclusion that there has been an invalid transfer of 9(a) responsibility, not a mere delegation of duties from principal to agent. In sharp contrast to the principal-union's ongoing active role in the servicing of unit employees in Suburban Pavilion, there is

no evidence that Local 355 has concerned itself with the current situation at the building or with Local 11's representation of the unit. Local 355's last formal contact with the unit appears to have been before the service agreement was signed. It has not had any formal unit meetings since then and "believes" that Local 11 has assigned someone to handle grievances, even though it is unsure whether Local 11 has access to the building. Further, despite Local 355's unsupported claim that it retains exclusive control over arbitration decisions, its involvement with the only grievance filed since the service agreement went into effect was very limited. Thus, Local 11 informed Local 355 that a unit employee had been terminated, Local 355 told Local 11 to proceed and does not appear to have had any further involvement in the matter and appears to have only a vague impression that Local 11, at some point, requested arbitration. These circumstances mirror the "in name only" nature of the principal-agent relationships in Goad and Sherwood Ford.

The terms of the service agreement, the breadth of the representational duties delegated therein to Local 11, and Local 355's conduct all demonstrate that Local 355 has tried to surrender responsibility for representing the bargaining unit and, in effect, transfer that authority to Local 11.[28] This is something it cannot do.

For all the above reasons, we conclude that the service agreement does not constitute a valid delegation of authority to Local 11 to act as Local 355's agent and the Employer has therefore not violated the Act by refusing to

[28] Given all of these factors, the fact that the instant case did not arise in the context of a failed attempt to transfer jurisdiction from Local 355 to Local 11, as was the case in Sherwood Ford and Goad, does not require a different conclusion.

deal or negotiate with Local 11 as Local 355's designated agent.[29] Accordingly, the instant charge should be dismissed, absent withdrawal.

B.J.K.

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[29] Because the Employer is willing and prepared to bargain with Local 355 and there is nothing to suggest that Local 355 would be unwilling to resume its representational duties if the service agreement is declared invalid, it is unnecessary to reach the issue whether the service agreement with Local 11 comprises a constructive disclaimer of interest so that the Employer has no obligation to bargain with either union. Cf. Sisters of Mercy Health, 277 NLRB 1353, 1353-1354 (1985) (union's written disclaimer of representational interest in favor of another local found effective where union's conduct in the 2 months between the disclaimer and renewed demand to bargain was entirely consistent with its earlier disclaimer); Royal Iolani Apartment Owners, 292 NLRB 107, 107-108 (1988) (disclaimer not effective where union signed disclaimer in deference to parent union's award of jurisdiction over employees to another local, but soon thereafter acted inconsistently with the disclaimer and continued to engage in representational activities for the employees).